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ABSTRACT

Changing political, social, economic, and intellectual conditions over the past two hundred years have demanded innovation and adjustment of legal doctrine, thus giving the United States Constitution a character which the framers of the document could not have predicted. Historically, one must not only understand developments since 1787 but also the roots of the constitutional system reaching down to a colonial base in the two centuries before 1787. Three principles from our constitutional past (popular sovereignty, federalism, and the rule of law) have innumerable applications, express faith as well as ascertainable fact, and have a breadth transcending the American experience. Popular sovereignty, the principle that governments derive their power from the consent of the governed; federalism, the division of power between a central authority and regional-local levels; and the rule of law, meaning a just government operating within the constraints of the legal system, all persist; at the same time, they are in some respects interpreted differently now than in former generations. The living Constitution of 1986 may differ from the text written in 1787, but the framers themselves made it possible. They felt it necessary and desirable to write a brief, open-ended document which would not have survived two hundred years if it had been long, detailed, and impossible to change. (APG)

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THE CONSTITUTIONAL HERITAGE

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THE CONSTITUTIONAL HERITAGE

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This paper was prepared for a Roundtable Meeting on the Constitution in the Education of Citizens, September 11, 1986 at Smith Research Center, Room 123, Indiana University, Bloomington.

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THE CONSTITUTIONAL HERITAGE

Nearly two centuries ago, in the summer's heat of 1787, fifty-five delegates from the American states met in Independence Hall at Philadelphia to draft a new constitution for the young nation. The document they completed in September then went to the existing Congress and to the several state conventions to be ratified, which occurred soon enough for a national government to commence operation in spring 1789. All this took place at a time of economic and political difficulty, of depression, of debtor-creditor conflict, of dwindling governmental capacity to handle alarming domestic and foreign problems.

Today we take the opportunity supplied by the approaching bicentennial, to consider the character and the history of our Constitution. We would like to identify those principles which the founders set forth and which have endured to the present. If we can do so, we may also reaffirm some civic values of this republic and may intelligently address formidable issues in our own time of difficulty.

One must start with a reminder of leading provisions of the Constitution itself, for too many people have a quite imperfect notion of what it says. Reflecting the concept of separation of powers, its first three articles (of seven) deal with the three branches of government. Article One concerns Congress, its membership and authority. Especially important is the eighth section, enumerating a good many legislative powers, some continued from the old Confederation but others freshly conferred, such as taxation and regulation of commerce. Article Two concerns the President. In light of the enormous scope of executive

action later on, the language is amazingly succinct: veto of bills, enforcement of laws, appointment of personnel, relations with foreign countries, command of the military. Article Three concerns the judiciary. Again, the provisions are brief: one supreme court with minimum original jurisdiction, mostly in cases between states, and with such appellate jurisdiction as Congress may determine; and such inferior courts as Congress may establish. The subject matter of cases in all federal tribunals is to consist chiefly of those where the parties have diverse state citizenship or where the question involves the national Constitution and laws. Nothing said about judicial review, the power to decide upon the validity of legislation. The other highlight of the document, a significant one, is Article Six, declaring that the United States Constitution, statutes, and treaties are the supreme law of the land, state laws to the contrary notwithstanding.

A student of constitutional history must at all cost avoid confining attention to the text of the document and to subsequent interpretation of it by the Supreme Court, however helpful this may be. To be sure, it is our organic law, and we have long recognized the role of the learned justices to expound its meaning. But the word "constitutional" properly comprehends many things related to the structure and operation of government. So presidential, congressional, and administrative branches have had roles as important as the judicial. And the fluid shape of these roles, building upon a short, often vague Constitution, has given it a character the framers could not predict. Changing

political, social, economic, and intellectual conditions over the past two hundred years have demanded innovation and adjustment of legal doctrine. Furthermore, since it is history we are studying, we must not only understand developments since 1787 but also roots of the constitutional system reaching down to a colonial base in the two centuries before 1787.

For purposes of discussion, I suggest three persisting principles coming down to us from our constitutional past: popular sovereignty, federalism, and rule of law. Each has had innumerable applications, each expresses faith as well as ascertainable fact, and each has a breadth transcending the American experience.

First, popular sovereignty means that governments derive their power from the people's consent and must be responsive to them both as to inalienable natural rights and as to others safeguarded by a social contract--or a constitution, if you will. The idea dates back through the course of Western thought and had special currency during the seventeenth and eighteenth centuries, as evoked by Englishman John Locke and others. In America, Jefferson's Declaration of Independence rests upon it, as we all know. A few years later, when the federal convention met in 1787, it was a generally accepted axiom, so that the framers could declare in the preamble: "We the People of the United States . . . do ordain and establish this Constitution."

This principle has had a profound, lasting influence ever since. It has had a democratizing impact, beginning in the age of Jackson, continuing through the era of progressive reform, and guiding

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contemporary political behavior. An outcome was extension of the voting franchise to all adult, male, and female citizens, regardless of religious creed or ownership of property or race. There was a trend toward direct popular participation in government and not merely an adherence to the proposition that the people created the government. The popular will has affected, if not controlled, policy making, administrative action, even judicial rulings. A vehicle has been the political party. Not mentioned anywhere in the Constitution, parties developed early on and came to perform several functions, ideological, consensual, electoral, and, we may venture, constitutional. They were nationalizing, they were channels of public opinion, they provided positive relationships among the three branches, and, in short, they helped define a flexible Constitution. An example was the dramatic turnaround in constitutional law during the mid 1930s, rejecting old restraints on federal economic regulation and redirecting the Supreme Court's attention to issues of civil liberty.

Second, federalism means the division of power between a central authority and regional-local levels. Perennially the problem has been where to draw a boundary separating the two. As early as the time of British governance of the American colonies, there was a federal system--in fact if not in accepted theory. An imperial sphere included control of the civil service, military affairs, land policy, and particularly trade, while a sizeable sphere of colonial self-government included representative assemblies, taxation for revenue, and many

local matters. It was precisely on the difficult question of a dividing line that the colonists revolted. But that was an episode rather than a resolution of continuing disagreement about federalism. At first, under the Articles of Confederation, there was the ambiguous arrangement of "sovereign" states within a "perpetual" union. Presently, as problems plagued the land, a second constitution formed "a more perfect Union" in which national authority directly connected with the people instead of so much reliance upon the states as intermediary.

Nationalists contended that the people had exercised their sovereignty in sanctioning concurrent operation at the two levels, though in case of conflict, statutes under the Constitution were supreme over state law (Constitution, Article Six). Still, a counter theory, always competitive and often dominant, asserted state sovereignty on the ground that the popularly created states had entered a compact creating the national government. Thus these sovereign states retained the balance of power, could judge the validity of congressional legislation when necessary, and could secede from the compact as last resort. It was this difference of views which recurred frequently: over the Sedition Act of 1798, the protective tariff in 1830-33, and soon slavery on the road to Civil War. While that conflict gave a bloody verdict for the nationalist position, the states' rights faith has remained a substantial element in our constitutional culture. The truth is that by its very nature federalism inevitably poses tough questions, but this nation has found practical answers really unique in history.

Third, the rule of law means that a just government must operate within the constraints of a legal system conforming to constitutional standards, giving effect to majority will, assuring that every person can know what the law is before acting, and providing equal treatment to all. The idea rejects special privileges, capricious decisions by officialdom, a tilt toward powerful interests. The Romans defined the rule of law as the opposite of what merely pleases the prince. Here is the concept that undergirded a constant opposition to tyranny and an American commitment to the republicanism of a free citizenry. While it upholds majority rule, it protects minorities as well. In our history, this attachment to limited government has been called constitutionalism, since we have relied a good deal on a fundamental law superior to positive legislation.

In our day, there have been adaptations of the rule of law which contrast in some respects with the earlier versions. To nourish liberty, we are not content with the negative strategy of leashing government, for we also employ a positive strategy of vigorous promotion. Accordingly, Congress has passed civil rights acts, executive departments have adopted regulations, commissions have monitored, and the courts have ruled on a wide variety of problems. Freedom of speech, press, and religion, racial justice, the administration of criminal law, and other concerns have been active areas. In a sense, all this represents convergence of the two principles of popular sovereignty and rule of law. Majority sentiment has moved to an advanced libertarianism in the cause of equal rights. In doing so, we read the Constitution differently

than former generations have. What would James Madison have thought about using the power of regulating commerce to protect liberty, as the civil rights law of 1964 did? And what would late nineteenth-century judges have thought of linking the Fourteenth Amendment's due process clause on life, liberty, and property to the First Amendment's guarantee of freedoms, since originally the one limited states and the other limited Dongress? Or what would lawyers of years ago have thought about nationalizing the procedural rules of criminal justice, primarily handled by the states in their time? One will note, by the way, the linkage of a new type of federalism with popular sovereignty and with the rule of law.

However much the so-called living Constitution of 1986 may differ from the text as written in 1787, we can be certain that, to a large extent, the framers themselves made it possible. As seasoned politicians, they felt it necessary and desirable to give us a brief, vague, open-ended document, which would not have survived two hundred years if it had been like our typical club constitution, long, detailed, and self-destructive.

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